No. 78-233

In the Supreme Court of the United States

OCTOBER TERM, 1978

PERSONNEL ADMINISTRATOR OF MASSACHUSETTS, ET AL., APPELLANTS

v.

HELEN B. FEENEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a Massachusetts statute that provides a preference for veterans over non-veterans in the selection of state civil service employees discriminates against women in violation of the Equal Protection Clause.

INTEREST OF THE UNITED STATES

Veterans' preferences have long been a feature of public employment. They need not, however, take a single form. The Massachusetts preference at issue here is an "absolute" preference. The federal pref-

erence has never applied in such an absolute way to such a large proportion of public employees as does that of Massachusetts. Moreover, President Carter has asked Congress to alter the federal veterans' employment preference because, among other things, it unduly interferes with employment opportunities for women and with management flexibility. The President's proposed changes would reduce the duration of the federal preference and the amount of the preference in several ways.[1]

But the existing federal laws still provide a significant preference to veterans, and federal law would continue to do so under the President's proposed changes. The Court's constitutional analysis of the Massachusetts program may affect the federal program—as it exists or as it may be modified—in spite of the differences between the two. The Court's analysis could affect other veterans' programs as well.

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[1] The President's original proposal would have made the preference available to veterans for only 10 years after their separation from the military (three years in the case of retired members of the armed forces) or until appointment to a permanent civil service position, whichever came first. Veterans' retention rights in the case of a reduction in force would have been limited to a period of three years following the veteran's appointment to a civil service position, although veterans would have received a permanent five years' seniority credit. The proposal would have eliminated veterans' preference for retired military officers with the rank of major or above, and limited its availability for other retired military personnel. See H.R. 11280, 95th Cong., 2d Sess. §§ 304, 305 (1978). Congress incorporated the President's proposals only to the extent they improved benefits for disabled veterans. See notes 5-7, *infra*.

1. The framework of the federal veterans' preference was established in the Veterans' Preference Act of 1944, ch. 287, 58 Stat. 387.[2] Under the provisions of that Act, preferences are extended to veterans,[3] to disabled veterans, and to certain relatives of veterans.[4] These three groups are called "preference eligibles." 5 U.S.C. 2108(3).

For most jobs in the competitive civil service, veterans who served during a war and who receive a passing grade on an entrance examination are entitled to have five additional points added to their scores. 5 U.S.C. 3309(2). Ten points are added to the test scores of disabled veterans. 5 U.S.C. 3309

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[2] Veterans' preference programs had been enacted by Congress and established by the Executive Branch since the Civil War. Although the 1944 Act was the first comprehensive legislation on the subject, it was designed to codify existing policies with respect to veterans' preferences. See Note, *Veterans' Preference in Public Employment: The History, Constitutionality, and Effect on Federal Personnel Practices of Veterans' Preference Legislation*, 44 Geo. Wash. L. Rev. 623, 624-626 (1976); see also *Fredrick* v. *United States*, 507 F.2d 1264, 1266-1267 (Ct. Cl. 1974).

[3] "Veterans" include those who received honorable discharges from the armed forces after serving on active duty during a war or on active duty for more than 180 consecutive days between 1955 and 1976. Service in the National Guard or military reserves is not credited. 5 U.S.C. 2108(1).

[4] The qualifying relatives include the unmarried widow or widower of a veteran, 5 U.S.C. 2108(3)(D), the wife or husband of a disabled veteran, 5 U.S.C. 2108(3)(E), and, under certain circumstances, the mother of a disabled veteran or a veteran who lost his life while serving in the armed forces, 5 U.S.C. 2108(3)(F), (G).

(1). In addition, for jobs other than scientific and professional positions in grades GS-9 or higher, qualifying disabled veterans must be considered, in order of their ratings, ahead of any other applicants. 5 U.S.C. 3313.[5] Similarly, certain civil service jobs—guards, elevator operators, messengers, and custodians—are open only to "preference eligibles" as long as there are any applying for those positions. 5 U.S.C. 3310.

A preference eligible also is entitled to "experience credit" for the time he spent in the armed forces if, when his career was interrupted by military service, he held a job similar to the federal job for which he is competing. 5 U.S.C. 3111(1). Various physical and age requirements for selection and promotion can be waived for a preference eligible if it is determined that he is qualified to perform the job. 5 U.S.C. 3312, 3363. When a preference eligible is passed over for employment in favor of a person who is not a preference eligible, the appointing authority must provide reasons for the decision; the Office of Personnel Management must then determine whether the reasons for passing over the preference eligible are insufficient. The Office

[5] The Civil Service Reform Act of 1978 added a provision to the federal veterans' preference program under which agencies may, under certain circumstances, appoint disabled veterans to career positions on a non-competitive basis. Pub. L. No. 95-454, 92 Stat. 1147-1148 (adding 5 U.S.C. 3112).

may require that the preference eligible be hired. 5 U.S.C. 3318(b).[6]

Preference eligibles also enjoy various benefits with respect to job retention and reinstatement. When a preference eligible resigns or is separated or furloughed from his civil service job, he is entitled to have his name placed on eligibility lists for every position for which he is qualified, in accordance with the preference scheme established in Sections 3309 and 3313. See 5 U.S.C. 3314-3316. Preference eligibles enjoy special procedural protections against dismissal for cause, 5 U.S.C. 7512, 7701, and they enjoy a variety of rights to preferential retention when a federal agency undergoes a reduction in force or transfers its functions to another agency. 5 U.S.C. 3501-3504.[7]

2. As is apparent from even this cursory review, the federal veterans' preference program is in many respects quite different from the Massachusetts preference. The Massachusetts scheme embodies an "absolute preference," under which all qualifying veterans must be considered for civil service positions ahead of any qualifying non-veterans. By contrast, the federal preference is based, in the main, on a

[6] The Civil Service Reform Act of 1978 provided new retention rights for certain disabled veterans, among a variety of new benefits for that group. Pub. L. No. 95-454, 92 Stat. 1149.

[7] This provision was amended slightly by the Civil Service Reform Act of 1978, to provide that the preference eligible shall be sent a copy of the Office's findings and, under certain circumstances, will be afforded an opportunity to contest those findings. Pub. L. No. 95-454, 92 Stat. 1148.

"point system," under which the preference merely augments each veteran's score and thus permits high-scoring non-veterans to be considered ahead of low-scoring veterans. The federal veterans' preference also provides a variety of more particular benefits to veterans, including experience credits, waivers of certain job requirements, and special retention and reinstatement rights.

In spite of these substantial differences, the federal preference is similar to the Massachusetts preference in certain limited respects. First, the requirement that the list of qualifying disabled veterans be exhausted before other qualifying candidates can be considered for certain jobs (5 U.S.C. 3313) parallels the operation of the Massachusetts scheme, although it is limited to certain jobs and to disabled veterans. Second, the restriction of the jobs of elevator operators, guards, messengers, and custodians to veterans as long as any are available (5 U.S.C. 3310) creates an even greater theoretical preference for those positions than the Massachusetts scheme, since minimum qualifications are not specified for those jobs under the federal statute. Finally, the federal veterans' preference benefits precisely the same class as does the Massachusetts preference. Thus, the same constitutional challenges based on the sexual composition of the beneficiary class that are made in this case might apply as well with respect to the federal veterans' preference.

Because of the similarities between the Massachusetts veterans' preference and the federal pref-

erence, the United States has an interest in participating in this case in order to defend those portions of the federal veterans' preference—as it exists or as modified by the President's proposals—that might be affected by the Court's ruling in this case. Moreover, the United States has an interest in articulating the considerations that, in our view, would support the constitutionality of both the federal veterans' preference scheme and federal veterans' benefits in general against equal protection claims of the sort raised here.[8] Finally, the United States has a more general interest as well: to defend the prerogatives of Congress and the Executive Branch to adopt

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[8] Veterans' benefits, other than the veterans' preference in public employment, include a wide range of programs. Among them are educational benefits, both for veterans and for their survivors and dependents, 38 U.S.C. 1601-1799; hospital and medical care, 38 U.S.C. 601-654; special home, farm, and business loan programs, 38 U.S.C. 1801-1827; compensation for veterans who die or are disabled as the result of a service-connected injury or disease, 38 U.S.C. 301-362; pensions for those suffering from non-service-connected disabilities, 38 U.S.C. 501-562; a special life insurance program, 38 U.S.C. 701-788; and various rehabilitation and job training and counseling services, 38 U.S.C. 1501-1511, 2001-2008.

In addition, federal law provides that a person who leaves a position with either a public or private employer for a period in the military service must be reinstated, after his period in the service, to a position similar in seniority, status, and pay to the one he left, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. 38 U.S.C. 2021-2026. Moreover, private employers contracting with the United States must agree to take affirmative action to employ disabled veterans and veterans of the Vietnam era. 38 U.S.C. 2012.

employment preferences for veterans and other groups without being subject to constitutional invalidation because of the incidental consequences of such preferences on other classes of employees or applicants.

STATEMENT

1. Massachusetts law provides that persons who pass examinations for appointment to state civil service positions [9] are placed on eligibility lists in the following order: first, all disabled veterans in order of their scores; second, all other veterans in order of their scores; next, widows and widowed mothers of veterans who were killed in action or who died as a result of service-connected disabilities, in order of their scores and finally, all other applicants in order of their scores. Mass. Gen. Laws ch. 31, § 23 (1973). The law further provides that a disabled veteran shall be retained in employment in preference to all other persons, including other veterans. *Ibid.*[10]

[9] The "examinations" may be in part written and in part a measure of the applicants' training and experience, or they may be solely a measure of training and experience. In either event, relevant experience in military service is credited (A. 73).

[10] The Massachusetts system provides certain additional benefits for veterans, including eligibility for employment without examination for certain highly decorated veterans, Mass. Gen. Laws ch. 31, § 22 (1973); waiver of minimum age requirements for veterans applying to police and fire departments, *id.*, § 22A; and preferences in selection to provisional appointments and to public labor services in the state, *id.* at §§ 24, 25.

When a state agency needs to fill a position designated as a civil service job, it notifies the Civil Service Division.[11] The Division then certifies a number of candidates for appointment from the top of the appropriate eligibility list and forwards those names to the agency. The agency may appoint an employee from among the names forwarded (A. 198).

2. In March 1975 appellee filed this action in the United States District Court for the District of Massachusetts. She sought declaratory and injunctive relief against the operation of the Massachusetts veterans' preference statute, alleging that it violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against women.[12]

Appellee, a female non-veteran, took the Massachusetts civil service examinations for two administrative positions with the state Department of Mental Health. Although she received high scores on both examinations, the application of the veterans' preference caused her to be ranked behind a number of veterans, including many who received lower scores on the examinations than she did (A. 205). Shortly after filing her complaint in this action, appellee sought and obtained an order barring the

[11] As of 1976 approximately 60% of the state jobs in Massachusetts were subject to the state civil service selection system (A. 196).

[12] No statutory claim was brought under Title VII of the Civil Rights Act of 1964, because Congress has provided that veterans' preference statutes are not subject to Title VII challenge. 42 U.S.C. 2000e-11.

state defendants from making permanent appointments to the two positions at issue, pending the outcome of the litigation (A. 195-196). The court then consolidated appellee's case with a similar action that had been brought by a female non-veteran seeking employment as an attorney with the Commonwealth, a position that at that time was subject to the state civil service selection provisions, including the veterans' preference.

A three-judge court was convened to consider the consolidated challenges to the veterans' preference statute. Prior to the court's decision, Massachusetts removed attorneys from the competitive civil service system. Accordingly, the action brought by the female attorney became moot (A. 206-211). The court reached the merits of appellee's claim, however, and held that the veterans' preference scheme unlawfully discriminates against women, in violation of the Equal Protection Clause of the Fourteenth Amendment (A. 221).

The court acknowledged at the outset that the Massachusetts veterans' preference, which is facially neutral with respect to sex, "was not enacted for the purpose of disqualifying women from receiving civil service appointments" (A. 212). The court further acknowledged that the State has a legitimate interest in assisting veterans by providing special treatment to them in the selection of public employees (A. 213). This interest, according to the court, is founded in the State's legitimate desire "to encourage service in the armed services, reward those

whose lives have been disrupted because they have served, and provide some assistance during the sometimes uneasy transition from military to civilian life" (A. 214-215).

In spite of these considerations, the court held that, because the Massachusetts veterans' preference substantially diminishes women's employment opportunities, it violates the Equal Protection Clause. The "worthy purpose" of the legislative program is not enough to shield it from judicial scrutiny, the court wrote. Instead, "[i]n the context of the Fourteenth Amendment, '[t]he result, not the specific intent, is what matters'" (A. 215, quoting from *Rozecki* v. *Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972)). Although the court noted that women had been appointed to approximately 43% of the permanent civil service positions in a sample 10-year period, it found that because of the veterans' preference few women had been considered for high-ranking positions in the state civil service (A. 218).[13] Because, as a practical matter, "status as a veteran [is a] *sine qua non* for

[13] The court observed that the percentage of female civil service appointees is "inescapably tied to circumstances totally beyond their control, or choice—the federal government's policy of limiting the number of women who may serve in the armed forces" (A. 218). Although the court expressed no opinion on the constitutionality of the statutes and regulations relating to women's participation in the military (A. 219 n.12), it concluded that the "combination of federal military enrollment regulations with the Veterans' Preference is a one-two punch that absolutely and permanently forecloses, on average, 98% of this state's women from obtaining significant civil service appointments" (A. 218-219).

obtaining the most attractive positions in the state civil service," the court held that "Massachusetts has effectively and unquestioningly incorporated into its public employment policy a set of criteria having no demonstrable relation to an individual's fitness for civilian public service" (A. 219).

The court stated that, in spite of its effect on women's employment opportunities, the Massachusetts veterans' preference system "might escape constitutional rejection if it were the only means by which the state could implement a program of veterans assistance in the area of public employment" (A. 219). But because in the court's view the State could have selected methods of benefitting veterans "without doing so at the singular expense of * * * its women" (*ibid.*),[14] the court concluded that the method chosen had too severe an effect on job opportunities for women to be sustained under the Equal Protection Clause.

Judge Murray dissented. He first observed that the veterans' preference statute is neutral on its face with respect to sex: female veterans are accorded the same preference as male veterans (A. 231). If there exists an almost insuperable barrier to women attaining higher civil service jobs, Judge Murray observed, "it is a circumstance that non-veteran women share with a large number of non-veteran men" (A. 232). Because, as the majority had acknowledged, the statute was not enacted with the intent of disqualifying women from civil service positions, Judge Murray considered the statutory distinction between veterans and non-veterans to be neither a gender-based classification nor a pretextual device by which to discriminate against women. Accordingly, Judge Murray would have assessed the veterans' preference under traditional equal protection standards, justifying the employment preference to veterans on three grounds: as a reward to veterans for their service to their country; as a device to take account of the valuable experience veterans gain in military service; and as an aid in the rehabilitation of veterans whose lives have been disrupted by a period of military service (A. 235).[15] On the basis of the court's finding that this case involves only "non-intentional adverse discriminatory impact on women," Judge Murray objected to the court's use of the more exacting test employed in cases involving classifications by gender (A. 237).

Judge Murray disagreed with the court's conclusion that the veterans' preference statute "suspends the application of * * * job-related criteria and substitutes a formula that relegates demonstrable professional qualifications to a secondary position, absolutely and permanently" (A. 239). This conclusion, he wrote, "assumes the unacceptable premise that only

[14] The court suggested that a point system that offered some reward for time spent in the military or a time limit for exercising the preference might be adopted. Nevertheless, the court declined to say that either of these provisions would be constitutional.

[15] The statute defines veterans to include both men and women. Mass. Gen. Laws ch. 4, § 7 (1973); *id.* at ch. 31, §§ 21, 21A.

selection criteria adhering exclusively and strictly to raw test score meet the standard of 'demonstrable professional qualifications' " (*ibid.*). Even apart from the veterans' preference, Judge Murray pointed out, the Commonwealth does not insist that candidates for civil service jobs be selected solely on the basis of their raw scores on the civil service examinations. Finally, he characterized the court's assertion that the veterans' preference is absolute and permanent as "but another way of declaring that 'the preference accorded to veterans is simply too great' * * * not that there is no rational basis for the classification" (*ibid.*).

3. The State's Attorney General appealed the district court's judgment to this Court. After first certifying a procedural question to the Supreme Judicial Court of Massachusetts,[16] this Court vacated the judgment of the district court and remanded the case for further consideration in light of the intervening decision in *Washington* v. *Davis*, 426 U.S. 229 (1976). 434 U.S. 884 (1977).[17]

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[16] The Court certified the question whether Massachusetts law authorizes the Attorney General of the Commonwealth to prosecute an appeal to the Supreme Court from the judgment of the district court without the consent (and over the objections) of the state officers against whom the judgment of the district court was entered. 429 U.S. 66 (1976). The Supreme Judicial Court of Massachusetts answered the question in the affirmative. *Feeney* v. *Commonwealth*, 366 N.E.2d 1262 (1977).

[17] While the case was pending on appeal, Massachusetts enacted a temporary veterans' preference statute providing a modified point preference for veterans. That statute will remain in effect only until a final judgment is entered in this case. Mass. Gen. Laws ch. 31, § 23 (Supp. 1978-1979).

The district court adhered to its determination that the Massachusetts veterans' preference statute is unconstitutional. The court concluded that *Washington* v. *Davis*, *supra*, and the subsequent decision in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), support its holding that the veterans' preference deprives women of the equal protection of the laws (A. 252).

The court acknowledged that *Washington* v. *Davis* held "that claims of invidious discrimination under the fifth or fourteenth amendments require proof of a discriminatory purpose" (A. 257). Although it had previously found that the Massachusetts veterans' preference "was not enacted for the purpose of disqualifying women from receiving civil service appointments" (A. 212), on remand the district court found that the required showing of discriminatory purpose had been made.

The veterans' preference, according to the court, "had the natural, foreseeable and inevitable effect of producing a discriminatory impact" (A. 259), and the legislature therefore was at least "chargeable with knowledge of the long-standing federal regulations limiting opportunities for women in the military, and the inevitable discriminatory consequences produced by their application to the challenged formula" (A. 260). Although the Commonwealth's *motive* was to benefit its veterans, the court concluded,

its *intent* was "to achieve that purpose by subordinating employment opportunities of its women" (A. 264). The intent to discriminate was established, according to the court, because "[t]he course of action chosen by the Commonwealth had the inevitable consequence of discriminating against the women of this state" (*ibid.*).

In a concurring opinion, Judge Campbell acknowledged that a statutory classification that is neutral with respect to sex or race would not be unconstitutional simply because it has an incidental unequal effect on one or another sexual or racial group (A. 266-267). But in his view the apparent neutrality of the veterans' preference law and the apparent absence of intentional discrimination "are both open to serious question" (A. 267). The veterans' preference may be facially neutral in a limited sense, Judge Campbell wrote, because "it is not based overtly on selection by sex, but since the preferred class is 98% male the effect is virtually the same as if it were" (*ibid.*). Judge Campbell also concluded that the effect of the veterans' preference on women is "inevitable," and that the "inevitability of exclusionary impact * * * undermines the argument of no discriminatory intent" (A. 268). Accordingly, Judge Campbell concluded that the "destruction of normal female opportunities in the state employment system is too evident a consequence of the super-imposition of veterans as an absolutely preferred class upon that system" to withstand constitutional challenge (A. 269).

Again, Judge Murray dissented. Although he acknowledged that in operation the statute "favors

males in greater proportion than females for the higher civil service positions," Judge Murray concluded that "the statutory classification has not been shown to be a mere pretext to accomplish the purpose of invidiously discriminating against women" (A. 271). To the contrary, as the majority itself had acknowledged, the legislature had apparently selected the veterans' preference for the sole purpose of aiding veterans. Because the record "does not show the operation of the statute and its effect to be a clear pattern, unexplainable on grounds other than an intent to limit the employment opportunities of women" (A. 272-273), Judge Murray concluded that the showing of discriminatory purpose required by *Washington* v. *Davis* was not made in this case and that the veterans' preference statute therefore should have been sustained.

The fact that the legislature could have chosen a more limited form of preference "provides no ground for indictment of the legislature's motive," Judge Murray stated (A. 277). It indicates that the legislature chose to provide veterans with a more substantial benefit, but not that it chose to do so in order to disadvantage women. Finally, Judge Murray observed that there is no reason to suppose that the veterans' preference statute would not have been enacted "if women were represented in the armed services in such numbers that the preference would have no discriminatory effect" (A. 279). Thus, it cannot be said that the enactment of the veterans' preference was caused by any legislative intent to discrim-

inate against women. For that reason as well, Judge Murray concluded that the Massachusetts veterans' preference should not be struck down.

SUMMARY OF ARGUMENT

Official action will not be held unconstitutional solely because it results in a disproportionate effect on a protected class. *Washington* v. *Davis*, 426 U.S. 229 (1976), held that proof of a discriminatory purpose also is necessary to establish a violation of the Equal Protection Clause. Evidence that a challenged decision or statute has a disproportionate effect may often be relevant to the issue of discriminatory purpose. But even though evidence of effect may well enlighten the inquiry into purpose, it cannot displace it.

The district court found that the Massachusetts legislature had adopted the veterans' preference statute for the laudable purpose of aiding veterans. But, the court also found, the legislature must have known that because the class of veterans is overwhelmingly male, the veterans' preference would achieve its purpose at the expense of employment opportunities for women. Applying the principle that a person is deemed to intend the natural and foreseeable consequences of his actions, the district court found that the Massachusetts legislature "intended" to injure the employment interests of women when it enacted its veterans' preference statute, even though that legislation was not enacted for that "purpose."

That was error. This Court's discussions of the intent or purpose that is required to establish an equal protection violation make it clear that "intent," "purpose," and "motive" are the same. The natural and foreseeable consequences of governmental actions may constitute probative evidence of discriminatory intent and may therefore require the production of convincing evidence of legitimate purposes. But here it is clear that the Massachusetts veterans' preference was intended to achieve legitimate objectives and not to discriminate against women.

The district court based its ruling in part on its view that the Massachusetts veterans' preference statute served no purpose whatever as a predicter of job performance in state civil service jobs. In so doing, the court appears not to have taken fully into account the legitimate purposes that a veteran's preference may serve, independent of any use it may have as an employment selection device. Veterans' preference schemes in general, and the federal program in particular, have traditionally been regarded as primarily serving several related purposes: to reward veterans for having served the country, usually at some personal sacrifice; to induce others to serve; and to facilitate the veterans' return to civilian life. The Massachusetts veterans' preference does not perpetuate any unlawful discrimination against women in the military. The basic distinctions by gender in the military are rational and serve important interests. We believe that particularly in light of Con-

gress' broad discretion in the realm of military affairs, those distinctions are not unlawful.

Finally, proof that a particular statute was motivated in part by an improper purpose does not necessarily require that the challenged statute be invalidated. It merely shifts the burden to the defendant to show that the same action would have been taken even if the impermissible purpose had not been considered. Accordingly, in this case even if the district court was correct that the Massachusetts veterans' preference statute constituted intentional discrimination against women, the State should have an opportunity to show that the legislature would have enacted the veterans' preference even if it had no effect on women.

In saying this, the United States does not endorse the Massachusetts veterans' preference or any particular form of veterans' preference. We have noted above that the President wishes to modify the existing federal preference system. The federal system—as it exists or as the President has proposed to change it—is different from the Massachusetts system in many respects. We do not address policy issues here except to note the reasons why, in our view, the federal veterans' preference is a rational and constitutionally permissible response to legitimate governmental concerns. Our argument is that the district court erroneously analyzed the constitutional issue in this case, and for that reason the judgment of the district court should be reversed.

ARGUMENT

I

THE VETERANS' PREFERENCE STATUTE DOES NOT PURPOSEFULLY DISCRIMINATE AGAINST WOMEN

A. Only Purposeful Discrimination Violates the Equal Protection Clause

Governments enact thousands of statutes. It is inevitable that some of these statutes will affect some groups more and in different ways than they affect others. The disparity in effect is apparent from even a cursory examination of significant governmental programs. For example, federal programs for the assistance of farmers aid a group that is overwhelmingly white and male. Federal and state social welfare programs assist many groups that are quite unlike the population at large: welfare programs assist poor persons who, because of social discrimination, are proportionately more black or Hispanic than is the general population; old age programs assist persons who, because of the mortality rates of men, are unusually likely to be female. The National Endowment for the Arts supports orchestras and ballet companies that are patronized predominantly by the well-to-do. In light of the preference of some religious groups for parochial education, public support of the public schools assists a population that is more Protestant than the population as a whole. The list could be extended almost indefinitely.

Few would argue, however, that the effects of these and other programs make them vulnerable to constitutional challenge. This is so because, as the Court has held, the mere fact that a public program affects members of one group more than it affects members of some other group does not mean that it is unconstitutional. To establish a violation of the Equal Protection Clause, a plaintiff usually must show both that the challenged action has a disproportionate effect on a particular class and that it was undertaken with the intent to affect that disfavored class. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Keyes* v. *School District No. 1, Denver Colorado*, 413 U.S. 189, 205, 208 (1973). In other words, the plaintiff must establish that "discriminatory purpose has been a motivating factor" in the decision to take the challenged action. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266, 270-271 n.21 (1977).

The "intent" requirement plays an important role in constitutional adjudication. Ordinary adjudication assesses the validity of a statute on its face. If the statute or rule refers to a particular class of persons, then the legislature must support its decision by whatever standard of justification is appropriate given the nature of the class sought to be affected. If the legislation on its face is neutral with respect to the classes particularly protected by the Equal Protection Clause, then the judicial inquiry usually is not searching; the Clause guarantees equal treatment by the law itself, but it does not guarantee that the law will yield equal results. If

groups of persons are unequally affected by the evenhanded application of an evenhanded statute, they suffer no constitutional injury. *Washington* v. *Davis*, *supra*. In many cases the disproportionate effects of a neutral statute may simply be evidence of private inequality that predated the law; because the Fourteenth Amendment reaches only inequalities caused by state action, the failure of a law to overcome such private inequalities provides no basis for constitutional objection. *Jefferson* v. *Hackney*, 406 U.S. 535, 548 (1972); *Maher* v. *Roe*, 432 U.S. 464, 470-477 (1977).

But it is not always sufficient to assess the constitutionality of a statute, rule, or practice on its face. Facial neutrality may be but a mask for the legislature's goals. A statute may use a facially neutral standard only because that standard is a close proxy for some other, forbidden, characteristic. The fact that a school board always offers a nonracial reason for its decisions is not enough to shield those decisions from scrutiny if they routinely favor maximum separation of the races; a court will look behind the facial criteria of decision to find some unexpressed criterion that accounts more accurately for the decisions.

Unless courts look behind the face of a statute or policy, they permit sophisticated discrimination to proceed unimpeded.[18] When a single facially neutral

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[18] See Brest, *Palmer* v. *Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 116-118.

policy happens to have an effect more harsh on women than on men there is usually no reason to be concerned; ordinarily it would be expected that some other policy would cut the other way. When the decisionmaker harbors an intent to make decisions on the ground of sex, however, the long-run neutrality that is the product of a series of adventitious effects will vanish; a legislature that resorts to unstated gender-based grounds for decision can be expected to limit the extent to which some policies adventitiously would favor women, and to augment the extent to which others favor men. In other words, an intent on the part of legislators to take gender into account in making decisions increases the likelihood that the incidental effects of all of its actions will be in the same direction. That sort of cumulative effect is at the core of the prohibition of the antidiscrimination principle.[19]

More than that, an intent to use an unstated characteristic as a rule of decision adds insult to injury. Racial segregation in the schools is unlawful not simply because it produces one-race classes but also because the very fact of purposeful separation imposes a stigma on those cast out. The purpose to use a particular ground of decision may make the result invidious, even though the same result, for a different reason, would be inoffensive. See *Keyes, supra; City of Richmond* v. *United States*, 422

[19] See Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 8-12, 26-31 (1976).

U.S. 358, 378-379 (1975); *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), *slip op.* 37-38 (opinion of Brennan, White, Marshall and Blackmun, JJ.).

As this discussion indicates, the Court has referred to the intent of the decisionmaker in order to identify those cases in which an unstated reason or ground of decision makes the statute or rule as offensive as if the reason had been stated expressly. The Court inquires into the "real" reasons for a decision in order to determine whether the statute or rule depends in part on an unstated, but forbidden or suspect, characteristic for its force and purpose. This role for "intent" in constitutional adjudication suggests the reason that intent is not found *solely* because a statute has a disproportionate effect on certain groups. The inquiry into intent is an inquiry into the "real" grounds of decision, into whether the decision is part of a pattern of decisions, into whether the decision adds insult to injury. If the simple fact of disproportionate consequences were enough to show "intent to discriminate," and consequently unconstitutionality, the intent inquiry would not serve these purposes. Indeed, it would not serve any independent purpose at all.

B. Awareness of Probable Disparate Effect Is Not the Same as Purposeful Discrimination

Like the federal veterans' preference, the Massachusetts veterans' preference statute is neutral on its face with respect to gender. Veterans—male and

female—are given certain advantages in selection for civil service jobs over non-veterans—male and female. The district court found that the veterans' preference statute was not designed as a pretexual device by which to discriminate against women (A. 212). To the contrary, the court found that the legislature's purpose, motive, and design in enacting the veterans' preference were just what they appeared to be: to benefit veterans (A. 213-216, 219, 254, 264). The court concluded, moveover, that this purpose is legitimate and that it is served by the veterans' preference (A. 215). Yet the court found that although the legislature did not have the "purpose" of limiting women's employment opportunities, it nonetheless had the "intention" to do so.

In distinguishing between purpose and intent—and giving conclusive significance to intent—the court relied on the principle that an actor ordinarily is deemed to intend the natural and foreseeable consequences of his acts. Because the veterans' preference has the "natural, foreseeable and inevitable effect of producing a discriminatory impact" (A. 259), the court held that the Massachusetts legislature intended to achieve its purpose of aiding veterans by "subordinating employment opportunities of its women" (A. 264). "The fact that the Commonwealth had a salutary motive," the court concluded, "does not justify its intention to realize that end by disadvantaging its women" (*ibid.*).[20]

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[20] Judge Campbell's concurring opinion provides a concise statement of the court's rationale (A. 268):

The district court's distinction between purpose and intent in illusory. This Court has used the terms interchangeably to refer to the factor or factors that motivated the persons who took the challenged action. See *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 414 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 265-266; *Washington* v. *Davis*, *supra*, 426 U.S. at 240-242; *Keyes* v. *School District No. 1, Denver, Colorado*, *supra*, 413 U.S. at 208, 210-211; cf. *Jefferson* v. *Hackney*, *supra*; *Wright* v. *Rockefeller*, 376 U.S 52, 56, 58 (1964). Because the district court found that injuring women was not among the considerations motivating the legislature to enact the veterans' preference, it could not properly conclude that the statute's effect on women was "intended" by the legislature. Intent, in the constitutional sense, refers to the factor or factors that motivated or contributed to the decision. An effect

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> This same inevitability of exclusionary impact upon women * * * undermines the argument of no discriminatory intent. There is a difference between goals and intent. Conceding, as we all must, that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's [employment] opportunities was an inevitable concommitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?

of a statute is "intended" only if that effect is a desired consequence.[21] By using the word "intent" to refer to the incidental, albeit inevitable, consequences of a statute designed to serve legitimate ends, the district court adopted an approach not materially different from the "effect" theory of equal protection that this Court has rejected.

To be sure, proof that a challenged statute has a disparate effect on a particular group may be important in ascertaining the intent of the decisionmaker. As the Court stated in *Village of Arlington Heights*, *supra*, 429 U.S. at 266:

[21] The Court's use of the term "intent" accords with the definition devised recently by Charles Fried: "[O]ne intends a result if that result is chosen either as one's ultimate end or as one's means to that end. One intends a result just in case one can say that one acted (or failed to act) in order to produce that result, just in case one would have to include that result in answer to the question 'Why did you do that?' or 'Why did you fail to do that?' Moreover, there are consequences of one's acting which, though foreseen with ever so much likelihood, are not intended at all. These results are mere side effects, [and they are so treated if one would act as one did even if the side effects vanished]." C. Fried, *Right and Wrong* 22 (1978).

The Court's analysis also accords with that suggested by Paul Brest in his thoughtful article, *Palmer* v. *Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95. According to Professor Brest, the objectives or purposes of a rule can be defined as "the state of affairs or effects that the decisionmaker seeks to establish or retain by promulgation of the rule." *Id.* at 104. "This means that for purposes of judicial review of motivation a decisionmaker does not necessarily have as his objective all of the foreseen consequences of his decision." *Id.* at 105 n.59.

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Washington* v. *Davis*, *supra*, at 242—may provide an important starting point.

Where disparate effect is very difficult to explain except as the product of purposeful discrimination, the evidence of effect may for all practical purposes establish the violation. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Guinn* v. *United States*, 238 U.S. 347 (1915).[22] Indeed, in some circumstances, evidence of a grossly disproportionate effect on a protected class justifies shifting the burden to the state to produce evidence that this effect was not the product of purposeful discrimination. See *Castaneda* v. *Partida*, 430 U.S. 482, 494 & n.13 (1977); *Washington* v. *Davis*, *supra*, 426 U.S. at 241; *Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972).[23] But even in such

[22] Nothing shows intent as well as a demonstration that a series of decisions *all* have a disparate effect. See *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Such a demonstration shows a cumulation of disadvantage inexplicable on grounds other than the forbidden but unstated characteristic.

[23] We have argued, and several courts of appeals have held, that once plaintiffs demonstrate that particular official action foreseeably resulted in segregation in the schools, that evidence creates a presumption that the action was taken with a discriminatory purpose. See *United States* v. *School District of Omaha*, 521 F.2d 530, 535-536 (8th Cir.), cert. denied, 423 U.S. 946 (1975); *Oliver* v. *Michigan State Board of Edu-*

cases, if the state official establishes that the prohibited factor was not part of the motivation for the decision, the equal protection claim must fail.[24]

Thus, no matter how compelling it may be, proof regarding the effect of a facially neutral statute is relevant only insofar as it sheds light on the ultimate question of discriminatory purpose. Evidence of disparate effect may make a finding of discriminatory purpose inevitable, but it can never make it unnecessary. Accordingly, the principle that one is deemed to intend the foreseeable and natural consequences of one's acts is applicable in equal protection analysis

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cation, 508 F.2d 178, 182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975); *United States* v. *Texas Education Agency*, 532 F.2d 380, 387-389 (5th Cir.), vacated and remanded, 429 U.S. 990 (1976). See generally Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317 (1976). Some commentators have suggested a burden-shifting approach whenever a showing is made that the state's action had an uneven impact on a protected class. See Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. Rev. 36, 56 (1977); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 559-560 (1977).

Because the district court found that the purpose of the veterans' preference statute was to aid veterans, not to injure women, it is not necessary to consider whether the evidence of disparate effect in this case was sufficient to shift the burden to the State to produce evidence that intent to discriminate was not a motivating factor in its decision.

[24] It should be clear, of course, that there may be more than one motive for a given decision. *Village of Arlington Heights* demonstrates that a plaintiff makes out a violation by showing that any one of the motives is improper.

only insofar as it suggests that evidence of foreseeable effects may be relevant to the issue of discriminatory purpose. See *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 179-180 (1977) (Stewart, J., concurring); *United States* v. *City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977); *Branch* v. *Du Bois*, 418 F. Supp. 1128, 1133 (N.D. Ill. 1976) (three-judge court).[25] In this case, then, when the district court found that the purpose of the veterans' preference statute was to aid veterans and not

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[25] The principle that one is deemed to intend the natural and foreseeable consequences of one's acts has a somewhat different application in tort law. Its principal use is to define the scope of damages liability. A person who acts negligently is liable only for the consequences that a reasonable man should have foreseen, whether or not he adverts to the risk. But if the person desires to cause the injury complained of, he is subject to the broader liability imposed for the so-called "intentional torts." Moreover, if he is substantially certain that injury will result from his acts, the person is still subject to the broader rules of liability, because the definition of intent incorporates not only those consequences that the actor desires to bring about, but also those consequences that he knows are certain or substantially certain to follow from his acts. *Restatement (Second) of Torts* §§ 8A, 20 (1965). W. Prosser, *Law of Torts* 32 (4th ed. 1971).

Because the intentional torts are presumed to be unjustified intrusions on the rights of others, the law does not distinguish between those intrusions that the actor desires to bring about and those that he knows will occur but simply does not bother to avoid. In the case of official action that is subject to equal protection scrutiny, no such presumption of impropriety obtains. Therefore, the Court has held that state action designed to serve neutral ends should be upheld if there is a rational basis for the action. See *Washington* v. *Davis*, *supra*, 426 U.S. at 247-248. This analytical difference indicates that tort principles cannot be applied uncritically in equal protection cases.

to injure women, that should have been the end of the matter.

C. Governments Have Legitimate Reasons for Adopting Veterans' Preference Statutes

In its first opinion, the district court recognized that a veterans' preference serves "the legitimate state purpose of assisting veterans" (A. 213). It "is designed to encourage service in the armed services, reward those whose lives have been disrupted because they have served, and provide some assistance during the sometimes uneasy transition from military to civilian life" (A. 214-215). The veterans' preference, the court concluded, "recognizes both the special problems of veterans and the need to promote an important aspect of the nation's welfare" (A. 215).

In its second opinion, the district court did not focus on any of these justifications for the veterans' preference. Instead, the court rested its finding of discriminatory intent in part on its view that the veterans' preference is of no value in predicting an individual's performance in a civil service job (A. 261). In so doing, the court ignored the justifications for veterans' preference statutes that it had acknowledged in its first opinion. Those justifications—encouraging enlistment, rewarding service, and assisting reintegration into civilian life—have been relied on repeatedly by the courts in sustaining both state and federal veterans' preferences against constitutional attack. As Judge Friendly noted with respect to a New York veterans' preference statute:

> The desire to compensate in some measure for the disruption of a way of life and often of previous employment occasioned by service in the armed forces and to express gratitude for such service is a rational basis for giving veterans a larger measure of job security.

Russell v. *Hodges*, 470 F.2d 212, 218 (2d Cir. 1972). See also *Fredrick* v. *United States*, 507 F.2d 1264, 1266-1267 (Ct. Cl. 1974); *Bannerman* v. *Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgen* v. *Jackson*, 355 F. Supp. 243, 251-252 (D. Minn. 1972) (three-judge court), aff'd mem., 410 U.S. 976 (1973); cf. *Johnson* v. *Robison*, 415 U.S. 361, 378-383 (1974).[26]

Nothing in the Constitution requires a state or the federal government to adhere strictly to the results of its competitive examinations in appointing persons to civil service positions. Indeed, a state would be free to abandon merit selection procedures altogether in choosing its public employees.[27] Accordingly, there is no constitutional infirmity in the state's decision

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[26] See also *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) (sustaining veterans' preference by private employer); *Hilton* v. *Sullivan*, 334 U.S. 323 (1948) (sustaining veterans' retention preference in federal employment).

[27] See *Elrod* v. *Burns*, 427 U.S. 347 (1976) (semble).

to give substantial weight to other social policies—such as those promoted by the veterans' preference—in selecting civil service employees.

An example may help to illustrate this point. A state might well determine that in the interest of rehabilitating prior offenders, it should reserve a large number of state jobs for former convicts. For the jobs set aside for the project, the selection of convicts would displace "merit" selection devices such as civil service examinations. Moreover, in light of the predominantly male character of prison populations, the project would doubtless provide jobs to more men than women. But we doubt that a serious constitutional challenge could be mounted against the project unless it could be shown that the desire to deprive women of job opportunities in the state civil service played some role in persuading the decisionmaker to adopt the policy.

Although Massachusetts has a legitimate interest in the related goals of encouraging and rewarding service in the armed forces and assisting persons who have served in the military to make the transition back to a civilian economy, the federal government's interest in these goals is even stronger. These interests would support the federal program regardless of the Court's decision in the present case.

The federal government is responsible for raising armies. It therefore has a direct and substantial interest in encouraging enlistment in the armed services. The benefits that accrue to veterans following their period of active duty may serve as an induce-

ment to enlistment, and Congress legitimately may seek to offer a variety of inducements—salaries, pensions, educational benefits, hospitalization, employment preferences—that are apt to be attractive to different degrees to different persons. The Court held in *Johnson* v. *Robison*, *supra*, 415 U.S. at 382-383, that this rationale justifies veterans' educational benefits, even though those benefits are unavailable to persons whose beliefs lead them to be conscientious objectors. Moreover, the federal government, as employer of its soldiers, has an interest in compensating them adequately for the service they provide. The veterans' employment preference, like military pensions, educational benefits, low-interest loan guarantees and veterans' administration services and privileges, may serve as deferred compensation for a period of service during which a veteran is generally substantially undercompensated.

Like other forms of deferred compensation to veterans, the federal veterans' preference doubtless benefits men as a class more than it benefits women. So, for that matter, does the payment of salaries to persons now in the service benefit a class that is overwhelmingly male. In spite of this, however, it is inconceivable that salaries, veterans' hospital privileges, veterans' educational benefits, and veterans' loan programs would be subject to serious constitutional challenge as violating the rights of women.[28] Cf. *Wash-*

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[28] This Court has held that for purposes of constitutional analysis, employment opportunities must be treated just like

ington v. *Davis*, *supra*, 426 U.S. at 248; *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 548.

Although the present federal system operates in a different fashion, the veterans' employment preference —as changed by the President's proposal or otherwise —is justified in principle by considerations similar to those pertaining to these other kinds of benefits conferred on veterans, and the constitutional arguments are also related.[29] Whether Congress extends a benefit to veterans in the form of a direct money payment, an exclusive right to certain federal services, or a competitive advantage in some area of the economy under federal control, the benefit provides federal resources to veterans at the relative expense of non-veterans.[30] Determining how great those benefits

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other economic benefits. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).

[29] Veterans' pensions, for example, are paid out of general revenues.

[30] As Judge Murray pointed out, the district court's suggestion that Massachusetts could have chosen an "effective, but less drastic, alternative[]" (A. 239) in its effort to aid veterans is simply a suggestion that the State reduce the size of the preference given to veterans (A. 220). It misses the point of veterans' preferences to suppose that the preference would serve its purpose just as well if it were reduced in magnitude. Because the purpose of a veterans' preference is to give veterans a relative advantage in the competition for certain public jobs, the size of the advantage conferred is the essence of the legislation. Unlike cases in which the legislative goal could be achieved equally well by means less destructive of other important interests, in the case of the veterans' preference the "effectiveness" of the statute in serving the legislative aims is reduced, *pro tanto*, as the preference is reduced from the level selected by the legislature. Thus, a "less drastic" preference level will of necessity be less "effective," unless "effectiveness" is defined as what the court, rather than the legislature, deems to be the appropriate relative employment advantage for veterans.

should be, and what form they should take, is a matter for Congress, the Executive Branch, and the state legislatures.

D. Federal Restrictions on Women's Participation in the Military Do Not Bring the Massachusetts Veterans' Preference into Conflict with the Equal Protection Clause

In finding that the veterans' preference discriminates against women, the district court relied in part on the fact that the federal government traditionally has restricted the role of women in the military. In the past, and to some extent in the present, the federal government has limited the number of women who could enlist and has barred women from certain kinds of military activities, such as combat duty. The district court did not suggest that the federal restrictions on the role of women in the military are unconstitutional or otherwise unlawful (A. 219 n.18). Instead, the court relied on these restrictions to support its conclusion that the Massachusetts legislature must have realized that the veterans' preference would substantially limit employment opportunities for women in the State.

Facially neutral action may, of course, violate the Equal Protection Clause if it perpetuates the effects of prior unconstitutional discrimination. This Court's

decisions dealing with the obligation of school officials to dismantle dual school systems establish that much. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Green* v. *County School Board*, 391 U.S. 430, 437-438 (1968); *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955). But this case does not present the problem of the perpetuation of prior unconstitutional discrimination.

It is by no means clear that the restrictions on women's participation in the military are unconstitutional. The Court has sustained at least one of the gender-based distinctions. See *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975). If it were necessary to do so here, we would argue that the distinctions are consistent with the Constitution. As to Massachusetts, then, the military's use of gender is relevant to the case only to the extent that it supports the inference that the Massachusetts legislature realized that the primary beneficiaries of the veterans' preference would be men. Nor is there any reason to suppose that Massachusetts intended to discriminate against women by importing a discriminatory device into its employment selection procedures under the pretext of using a neutral selection method. Absent some showing of an intent to discriminate on that ground, there is no basis for holding that the gender distinctions in the military, even if impermissible, should

be sufficient to strike down a classification based on status as a veteran.[31]

Second, the veterans' preference is not a benefit conferred on a class that has been the clear beneficiary of prior official discrimination. In many respects, military gender distinctions operate to the disadvantage of men, not in their favor. Conscription extends only to men, and only men are sent into combat. Thus, all women in the military have entered the service voluntarily, while many men have not. We recognize, of course, that seemingly preferential treatment is not always benign, and that women as well as men may suffer because of gender distinctions in the military. Nonetheless, in significant respects, men have plainly been disadvantaged by the gender distinctions established by the military. The district court's assumption that the veteran's preference perpetuates a form of discrimination against women is therefore not altogether accurate.

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[31] The question whether restrictions on women's participation in the military violate the Constitution is, of course, not presented in this case. Although the Court has never directly passed on that question (cf. *Kahn* v. *Shevin*, 416 U.S. 351, 356 n.10 (1974)) the Court has noted that in the realm of military affairs, congressional determinations are entitled to particularly great deference by the courts, see *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975); *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955); *Orloff* v. *Willoughby*, 345 U.S. 83, 95 (1953). We believe that in light of that principle and in light of the reasons for which most gender distinctions in the military have been devised, those distinctions would survive constitutional challenge.

II

MASSACHUSETTS SHOULD HAVE BEEN ALLOWED TO PROVE THAT ITS VETERANS' PREFERENCE WOULD HAVE BEEN ADOPTED WHETHER OR NOT IT HAD AN EFFECT ON THE EMPLOYMENT OPPORTUNITIES OF WOMEN

Even if this Court should conclude that the Massachusetts veterans' preference statute amounted to intentional discrimination against women, it should not strike down the statute. The State should have an opportunity to show that the legislature would have enacted the veterans' preference even if it had no effect on women.

As this Court has pointed out on several recent occasions, proof that a particular statute or official action was motivated in part by an improper purpose does not necessarily require that the challenged action be invalidated. It merely shifts to the defendant the burden of establishing that the same action would have been taken even if the impermissible purpose had not been considered. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 270-271 n.21. If the defendant meets the burden, the plaintiff is not entitled to relief, since he "no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose" (*ibid.*). See also *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 285-287 (1977); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406,

420 (1977); *Carey* v. *Piphus*, 435 U.S. 247, 260 (1978). Therefore, even if appellee is correct in her assertion that the veterans' preference constitutes intentional discrimination against women, she is entitled to a remedy only if the veterans' preference would not have been enacted if the purpose of discriminating against women had not been considered.

As Judge Murray noted, the district court did not find, and nothing in the record suggests, that the legislature would have refrained from adopting the veterans' preference if it knew that the effect on women could play no role in its decision. Indeed, in light of the court's suggestion that the Massachusetts legislature was simply indifferent to women's employment opportunities when it enacted the veterans' preference, it appears quite likely that the absence of injury to women would have made the veterans' preference at least as acceptable to the legislature, if not more so. Accordingly, even if the district court's finding of intent to discriminate against women is accepted, that finding would not necessarily justify the remedy ordered by the district court. The State should have an opportunity to show that the improper intent did not affect the decision, and only if the court finds against the State on that issue can it hold the statute unconstitutional.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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